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COURT OF CRIMINAL APPEALS
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NO. PD-0075-19

APPELLATE COURT CAUSE NO. 03-18-00194-CR

FILED
COURT OF CRIMINAL APPEALS
12/9/2021
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IN THE COURT OF CRIMINAL APPEALS

REYNALDO LERMA,
Petitioner

VS.

THE STATE OF TEXAS,
Respondent

STATE'S MOTION FOR REHEARING

FROM THE COURT OF APPEALS FOR THE THIRD DISTRICT AT AUSTIN

ORIGINAL APPEAL FROM THE 22ND JUDICIAL DISTRICT COURT, HAYS COUNTY, TEXAS, TRIAL COURT CAUSE NO. CR-15-0598

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

COMES NOW the State of Texas, by and through her Hays County Criminal District Attorney, Wesley H. Mau, and files this Motion for Rehearing and would show the Court the following:

In affirming the trial court's actions, the Court endorses trial courts arbitrarily overruling the Rule 508 privilege and reversing the burden of proof required under Rule 508. The Court's holding authorizes a trial court not only to disregard evidence that it finds not credible, but also to consider that credibility finding itself as evidence supporting any factfinding that the trial court cares to make, even absent any substantive evidence supporting such a finding.

If the Court's opinion stands as precedent, then there is no confidential informant who is not subject to disclosure at the trial court's whim and imagination, and the trial court's decision is unreviewable.

A. The majority opinion does not address the trial court's initial error in holding the *in camera* hearing without evidence to require it

The majority opinion does not address the trial court's initial determination to order disclosure without an *in camera* hearing, and then to hold the *in camera* hearing without holding Appellee to the burden assigned by Rule 508. At no time prior to the *in camera* hearing did Appellee offer any evidence to justify more than speculation as to the informant's potential testimony, other than the informant's having purchased

marijuana from the victim three months prior to Appellee and his accomplices attempting to rob the victim.[1]

Before the *in camera* hearing, the trial court conceded that there was no evidence that the informant had relevant testimony to offer.[2] The court then reversed the Rule 508 burden, stating, "Never been a showing that he doesn't have evidence to give. That's the problem is there is no evidence that he did -- had no evidence because we don't know who he is."[3] While the court's frustration at not knowing the informant's identity is understandable, it puts the cart before the horse. Whether the informant's identity should be determined is only an issue if the defense first establishes a reason—beyond mere speculation or conjecture—to believe the informant's testimony would be necessary.

In affirming the trial court's actions, this Court has approved the trial court's holding an *in camera* hearing despite the trial court's own admission that the defendant

[1] Appellee has argued that the State should not be permitted to complain about the court's conducting the *in camera* hearing, because the prosecution asked for the hearing to be conducted. However, the only reason the prosecution made the demand is because the trial court initially ordered disclosure without conducting the hearing. The prosecution always maintained--and the record shows--that the evidence was insufficient to justify the *in camera* hearing. Just before the *in camera* hearing, the State once again pointed out "there has never been a showing that that confidential informant would have any evidence to give in this murder/robbery case." 7 RR 21. The trial judge responded, "Never been a showing that he doesn't have evidence to give." 7 RR 21.

[2] 7 RR 21.

[3] 7 RR 21.

has offered nothing more than speculation as to whether the informant's information might be important.[4]

B. <u>The majority cites no evidence establishing that the informer is likely to have evidence to offer at trial</u>

The Court's majority opinion holds that the evidence offered to support disclosure in this case is enough to satisfy Rule 508 and cites eight points supporting the trial court's finding.[5] In fact, all of that "evidence" supports only the inference that law enforcement was intent on protecting the identity of a confidential informant, not that the informant had material testimony to offer in this case.

1) ***There was an informant who was involved in a controlled buy with Espino.*** A controlled buy is a procedure by its very nature designed to prevent a suspect from learning an informant's identity.
2) ***Espino was not charged as a result of the controlled buy***. If the informant's identity is to be protected, Espino could not be charged until further evidence unconnected with the informant could be obtained. In almost every other case cited in the briefs, the courts were dealing with an arrest that occurred on a separate occasion from any interaction between the informant and the suspect.

[4] 5 RR 6-7; 7 RR 21.
[5] *State v. Lerma*, PD-0075-19, 2021 WL 5513553, at *5 (Tex. Crim. App. Nov. 24, 2021)

This standard procedure avoids disclosing informants' identities to the suspects against whom they inform.

3) ***Espino was shot and killed by Alejandro, his fellow drug dealer.*** No evidence links Alejandro's shooting of Espino to the informant. If Alejandro shot Espino intentionally, as opposed to the more obvious "friendly-fire" scenario, there remains no evidence to support the inference that either Alejandro or Espino was aware of the informant's existence, or more to the point, that the informant would be able to testify about Alejandro's motive.

It is also not reasonable to infer that Alejandro colluded with the persons who attempted to rob his home at gunpoint, and whom Alejandro also shot. Nor is it reasonable to infer that Alejandro, having shot at home invaders, then used the circumstance to cover the intentional killing of his housemate, so as to summon the police to his home in response to the shooting, thereby inviting the police to discover the evidence of his narcotics activity that he purportedly killed Espino to prevent police from discovering.

4) ***The State, through the Task Force, vehemently and vigorously fought to prevent disclosure of any information relating to the informant.*** The majority's citation to the Task Force's efforts to assert the privilege as evidence supporting denial of the privilege is particularly troubling. The State's "vehement and vigorous" fight to prevent disclosure was nothing more than

asserting the privilege and objecting to the trial court's refusal to comply with Rule 508. The privilege only exists because informers' identities should remain confidential to protect those who assist the police from discovery and retaliation. If the State asserting the privilege is evidence that supports overruling the privilege, then what value is the privilege? Would the State asserting the privilege dispassionately and meekly then not be "evidence" supporting the speculation?

5) and 6) ***After the parties agreed to the* in camera *hearing, the Task Force suddenly forgot who the informant was and failed to document any information relating to the informant, in violation of their own policies and procedures.*** While the trial court is within its discretion to disbelieve witnesses' testimony, and to infer that a witness who is lying has some motive to do so, the only supported justification for the Task Force officers doing so here would be to protect the informant's identity. Assuming the officers were so desperate to protect this informant that they were willing to lie,[6] how does their assumed deceit create an inference that the informant had material evidence to give in this case? Does a trial court's finding that law enforcement is lying about an informant's existence or identity nullify Rule 508 or otherwise obviate a

[6] To be clear, the State does not believe the officers lied, but we accept that the trial court is free to disbelieve their testimony.

requestor's burden to present some non-speculative evidence? Or does a trial court's credibility finding against those seeking to protect the informant's disclosure create the "evidence" required to support disclosure or dismissal no matter how tenuous said informant's connection to the charged offense may be?

7) ***The Task Force officers all testified that the defense theory was possible that the informant had told Alejandro of the controlled buy and Alejandro used the robbery as an opportunity to kill Espino.*** The majority misstates the evidence regarding the officers' testimony as whether it was "possible that the informant had told Alejandro of the controlled buy." As the Court of Appeals noted:

> the officers merely affirmed that the hypothetical the trial court proposed, in which [the roommate] Alejandro intentionally killed Espino, was "possible." The officers did not testify that the hypothetical situation was very likely, more likely than not, or even reasonably probable. Nor did they testify that they believed the hypothetical theory to be true or that they had any reason to believe that it was true.[7]

a. Parham did not "agree[] that the informant's identity could be exculpatory."[8] Parham was *told by the judge,* "Somebody may have told [Alejandro] about this controlled buy and he may have been very suspicious and paranoid about his roommate and may have used this

[7] *State v. Lerma,* 03-18-00194-CR, 2018 WL 5289452, at *8 (Tex. App.—Austin Oct. 25, 2018), rev'd, PD-0075-19, 2021 WL 5513553 (Tex. Crim. App. Nov. 24, 2021).

[8] *State v. Lerma*, PD-0075-19, 2021 WL 5513553, at *5 (Tex. Crim. App. Nov. 24, 2021).

particular affray as an opportunity to dispose of the problem." Then when asked, "Do you see how that would be exculpatory?" he said, "Yes."[9]

b. Grabarkewitz, likewise, was told, "the informant, if he knew [Espino], chances are pretty good he could have known the two roommates and he might have told him," to which Grabarkewitz replied, "Anything is possible."[10]

c. Martinez was told, "the concern is -- for the defense team is that from some source, maybe from the informant himself, the shooter, the roommate that shot Joel, found out about that controlled buy and feared that Joel was going to get flipped on him and took the opportunity when this fracas occurred to eliminate that problem by shooting Joel. And if that's true and there is a way to prove it, the defense team is entitled to that as a exculpatory evidence…So, see, I mean, that could be evidence of innocence at least to the murder?"[11] Martinez agreed.[12]

The majority holds that a witness's admission that a fact could be possible is sufficient to establish that fact. But this testimony cannot be categorized as anything beyond "mere conjecture or supposition about possible

[9] 7 RR 63.
[10] 7 RR 54.
[11] 7 RR 73.
[12] *Id.*

relevancy," that did not support disclosure.[13] Here, the officers did nothing more than agree with the court's conjecture. None of the officers testified that any of the facts proffered by the trial judge were factual. Nor did they testify that the informant had any information that would help to establish those facts.[14]

If speculation is all that Rule 508 requires, then it is no burden at all. No witness could truthfully testify that it is impossible for another person to have potentially relevant evidence to give. The same argument would justify the disclosure of every informant in every case. It is always going to be "possible" that an informant might know information about other cases, even cases involving totally different suspects. By holding that materiality can be supoprted by an officer merely admitting to the possibility that a completely hypothetical set of facts, if true, might be material, this Court undermines every case that has ever interpreted Rule 508 to require the defendant to show that an informant has material evidence to offer.

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[13] *Bodin v. State*, 807 S.W.2d 313, 318 (Tex. Crim. App. 1991)

[14] In fact, the trial judge did not even ask the officers during the *in camera* hearing whether they had any knowledge about the informant's activities following the controlled buy. *See* 7 RR 38-75. Other than the activity surrounding the controlled buy itself, their failure to document the CI's identity, and the hypothetical questions, the judge did not ask a single question about what the officers might know about the CI's potential testimony regarding the robbery at the house three months later. For example, "Did the CI ever tell you he thought that Alejandro knew about the controlled buy?"

8) **After the hearing, an e-mail was disclosed showing that the Task Force's commander did, in fact, know who the informant was.** Parham's August 19, 2016, email (well prior to any order to disclose), stated, "I'm not going to reveal which informant made the purchase from Espino in case TF15-033," and assured the prosecutor that it was not anyone involved in the homicide. While it is not a necessary inference, the trial court could find from this email that Parham knew the identity of the informer. But Parham's stated intention not to reveal that identity does not support the inference that the informer had material testimony to provide in a murder case that occurred three months after the controlled buy. Even if it were true that the informant had disclosed to Alejandro that he was informing on Alejandro and Espino (as unlikely and self-destructive as that would have been), Parham's knowing the informant's identity is no evidence of that fact.

The majority holds that "the court of appeals failed to give deference to the trial court's credibility determination of the Task Force officers."[15] The Third Court, however, said,

> Even if we defer to the trial court's finding that the Task Force officers who testified at the hearing were untruthful, we cannot conclude, based on the record before us, that [Petitioner] met his initial burden of showing that a reasonable

[15] *State v. Lerma*, PD-0075-19, 2021 WL 5513553, at *6 (Tex. Crim. App. Nov. 24, 2021)

> probability exists that the informer could give testimony necessary to a fair determination of his guilt or innocence.[16]

The majority holds

> From the evidence that the Task Force officers were untruthful to the court about the informant, and the evidence that the Task Force officers had strongly resisted disclosure of information relating to the informant, the trial court's conclusion that the informant had information affecting the capital murder case against Appellee was not unreasonable. [17]

Under this ruling, if a trial court arbitrarily and unreasonably announces his intention to order disclosure of an informant's identity, and law enforcement invokes the informer's privilege, there is no burden on the defense to show materiality—the trial court merely has to state that he does not believe that law enforcement has shown the informant doesn't have material testimony to offer. Not only does the majority's holding switch the burden from the defense to law enforcement, it also requires law enforcement to prove a negative that they would surely never be able to establish. Under the majority's holding, Rule 508 will not exist in a trial court that is hostile to the use of confidential informants because all the trial court has to do to support disclosure is find that the law enforcement is lying about what relevant information the informant may have about the underlying offense.

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[16] *State v. Lerma*, 03-18-00194-CR, 2018 WL 5289452, at *8 (Tex. App.—Austin Oct. 25, 2018), rev'd, PD-0075-19, 2021 WL 5513553 (Tex. Crim. App. Nov. 24, 2021)

[17] *State v. Lerma*, PD-0075-19, 2021 WL 5513553, at *6 (Tex. Crim. App. Nov. 24, 2021)

C. The majority opinion ignores the trial court's own concession that Appellee's theory was conjectural.

The trial court conceded on the record that the evidence was insufficient to show that the informant had useful information. Following the *in camera* hearing, after reviewing the record of the officers' testimony, the prosecutor argued, "I still maintain that there has been no showing that this informant, to the extent that he may have information that would be of some potential use to the defense, that's conjecture. That's speculation."[18] The trial judge replied, "Well, it is, but it -- the bottom line is, it very well could have been exculpatory. I made that finding and we'll never know because somebody's either lying or didn't do their job."[19]

Both the trial court and the majority ignore Rule 508's core requirement: that the informant must have testimony to offer at trial. The record is void of any indication of what the informant might be able to say that is not conjectural. Void.

While the trail judge's frustration with the Task Force is understandable (and shared by the State), Rule 508 is meant to protect informants, not punish narcotics officers for lazy or unprofessional work. When the judge admits that the theory upon which he is ordering disclosure is speculative, he cannot then order disclosure of the

[18] 9 RR 13.
[19] 9 RR 13.

informant's identity. To do so, "just in case" completely annuls Rule 508's protections for informants.

D. The majority opinion makes any decision by a trial judge to order disclosure unreviewable on appeal.

Prior to the *in camera* hearing, the trial court informed the parties that he intended to deny the privilege and did not care what the evidence was going to be.[20] After going through the motions of the *in camera* hearing, the court simply declared all the evidence he received was not credible. By endorsing this ruling, the majority has established as precedent that a judge may deny the informer's privilege by simply deciding what facts he wishes to believe. If the evidence supports the trial court's belief, then he may deny the privilege. If evidence does not support the trial court's belief, then he may declare the witnesses to be not credible and deny the privilege. Any decision by a trial court, no matter how arbitrary or unreasonable, must be sustained because any evidence that does not explicitly support the court's decision implicitly supports it because the witnesses are lying. Even if there is no affirmative evidence to support the trial court's finding, it must be sustained because the trial court's disbelief is sufficient to prove the opposite of the testimony.

[20] 7 RR 22.

In a case where conflicts in the evidence must be resolved by the factfinder, the trial court clearly has the discretion to resolve those conflicts. But here there is no conflict in the evidence, the trial court simply decided not to believe the evidence he elicited from the officers.

PRAYER FOR RELIEF

Respondent prays this Court rehear this case and affirm the Third Court of Appeals' ruling.

Respectfully submitted,

By: Wesley H. Mau

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CERTIFICATE OF COMPLIANCE WITH TEX. R. APP. P., RULE 9.4

I certify that this Motion for Rehearing contains 3,175 words,[21] as indicated by the word count of the computer program used to prepare the document.

Wesley H. Mau

Wesley H. Mau
Criminal District Attorney

[21] A motion for rehearing must not exceed 4,500 words if computer-generated. Tex. R. App. P., 9.4(i)(2)(D).

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing brief has been email-delivered via efile to counsel for Petitioner and the State Prosecuting Attorney on this the 8th day of December, 2021.

Wesley H. Mau
Criminal District Attorney

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